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February 14, 2007

Via E-Mail

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Administrative Office of the United States Courts
Washington, DC 20544

Re: Proposed Federal Rule of Evidence 502(c)

Dear Mr. McCabe:

We write in response to the request for public comments on proposed Federal Rule of Evidence 502(c) regarding selective waiver of the attorney-client privilege and work product doctrine. Our Firm represents, among other clients, institutional investors in securities and stockholder litigation and employees in discrimination cases. In representing such plaintiffs, we have frequently obtained otherwise privileged information from corporate defendants that had waived the privilege under current law by disclosing the privileged information to government investigators. We respectfully submit that the majority view under the existing case law in this area is correct and should not be reversed through rulemaking. The proposed Rule 502(c) does not serve the legitimate purposes of the attorney-client privilege and work product doctrine and should not be adopted.

The purpose of the attorney-client privilege is to encourage disclosures by clients to lawyers that better enable the clients to comply with the law and to present legitimate claims or defenses in litigation. *See Upjohn Co. v. United States*, 449 U.S. 383, 389-90 (1981). The purpose of the work product doctrine is to enable lawyers to assemble and analyze information, prepare legal theories, and plan litigation strategy in confidence so as to promote the adversary system. *See Hickman v. Taylor*, 329 U.S. 495, 510 (1947). Neither purpose would be served by permitting selective waiver. Allowing parties to disclose privileged information to the government but not to private plaintiffs would not encourage frank communications between the parties and their lawyers. Instead, it would enable parties under investigation by the government

to strategically pick and choose among their adversaries, disclosing privileged information to the government to obtain favorable treatment, while asserting the privilege against private plaintiffs to avoid compensating victims for their injuries. Nor would permitting selective waiver "promote[ ] the adversary system by enabling attorneys to prepare cases without fear that their work product will be used against their clients." *Id.* at 510-11. Rather, it would create an uneven playing field in which work product is disclosed to one adversary for the benefit of the wrongdoer, yet withheld from the very adversaries who suffered from the wrongdoer's misconduct.

The leading case representing the minority view on selective waiver justified its result on the basis that "[t]o hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them *in order to protect stockholders, potential stockholders and customers*." *Diversified Indus. Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1978) (emphasis added). In reality, however, permitting selective waiver would *harm* stockholders and other victims of corporate malfeasance.

Two examples from among cases that have been handled by our Firm will illustrate how the majority view's rejection of selective waiver helps to vindicate the rights of persons who have claims against parties that choose to disclose privileged information to the government. In *Ohio Public Employees Retirement System v. Freddie Mac* (S.D.N.Y. No. 03-CV-4261) and *In re King Pharmaceuticals, Inc. Securities Litigation* (E.D. Tenn. No. 03-CV-77), we represented the Lead Plaintiffs and recovered $410 million for Freddie Mac stockholders and $38.25 million for King Pharmaceuticals stockholders. In both cases, the stockholders were defrauded by the companies' false and misleading statements about their financial results. In both cases, the defendants waived their privileges by disclosing information from their internal investigations to government agencies in order to obtain lenient treatment by the government. Production of the privileged information to the Lead Plaintiffs as a result of the waiver provided valuable insights into the frauds and significantly strengthened the stockholders' cases against Freddie Mac and King Pharmaceuticals.

Notably, the government investigations of these companies did not result in any monetary recovery for the defrauded stockholders. Freddie Mac agreed to pay a civil penalty of $125 million to the federal government, and King Pharmaceuticals agreed to pay $124 million to federal and state healthcare authorities. In both cases, the payments to the government were not for the benefit of the stockholder victims of the frauds. Thus, the existing law rejecting selective waiver served its purpose in these cases. Defendants could have asserted their privileges against all adversaries, but once they chose to waive the privileges with respect to the government, fairness required that the disclosed information also be provided to the stockholder plaintiffs. The government investigations achieved important governmental enforcement objectives, but they did not redress the injuries to the stockholders. The securities class actions by private plaintiffs fulfilled their "private attorney general" function of vindicating stockholder rights, and

the law properly barred defendants from picking and choosing among their adversaries when waiving privilege. "A plaintiff in a shareholder derivative action or a qui tam action who exposes accounting and tax fraud provides as much service to the 'truth finding process' as an SEC investigator." *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 303 (6th Cir. 2002).

We also respectfully submit that reversal of the law on selective waiver is a question best left to Congress without the implied judicial endorsement that would be perceived if it was proposed by the Advisory Committee. Far from being the sort of technical improvement in the rules that is properly handled through the rulemaking process, adoption of the proposed Rule 502(c) would be a controversial, value-laden political decision. Rules of privilege must balance the competing values of preserving confidential relationships, on one hand, and the detrimental effect that excluding relevant and material information has on the judicial truth finding process, on the other hand. For that reason, "rules of privilege reflect a substantive policy choice between competing values, and this policy choice is legislative in nature." H.R. Conf. Rep. 93-1597, 1974 U.S.C.C.A.N. 7098, 7111 (statement of Representative William L. Hungate regarding adoption of 28 U.S.C. § 2074(b)). If proposed, the rule would require affirmative adoption by Congress, but the Advisory Committee should refrain from taking a position on such a controversial reversal of long-settled law. The proponents of such a change in the law should address their concerns to Congress directly.

We appreciate the opportunity to comment on the proposed rule.

Respectfully submitted,

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By: 
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